Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-2049

STEVEN MANN, ET AL,
*Petitioners*

v.

UNITED STATES OF AMERICA,
*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## 1. REFERENCE TO OPINION BELOW

On April 17, 1980, a panel of the United States Court of Appeals for the Fifth Circuit rendered its opinion affirming in part and remanding in part Petitioners' conviction in the District Court. A copy of the opinion is attached hereto as Appendix A and is reported at 615 F.2d 668. Petitioners' timely motion for rehearing was overruled with a second opinion delivered May 27, 1980, appended hereto as Appendix B.

## 2. JURISDICTIONAL STATEMENT

A. The opinion below was rendered on April 17, 1980.

B. The opinion overruling the petition for rehearing was rendered on May 27, 1980.

C. Petitioners invoke the jurisdiction of the Supreme Court pursuant to 28 U.S.C. § 1254(1).

## 3. QUESTIONS PRESENTED FOR REVIEW

A. Whether the U. S. Coast Guard may constitutionally board a U. S. vessel on the High Seas and search for contraband without Probable Cause or Reasonable Suspicion under the pretext of a "safety and documentation inspection" as authorized by 14 U.S.C. § 89(a). The Ninth Circuit (*U. S. v. Piner,* 608 F.2d 358 (C.A. 9 1979)) and the Fifth Circuit (*U. S. v. Postal,* 589 F.2d 862, 889 (C.A. 5 1979)); *U. S. v. Warren,* 578 F.2d 1058, 1064-65 (C.A. 5 1978)) are in direct conflict on this point.

B. Whether the criminal jurisdiction of United States Courts regarding the statutes involved here extends to acts committed wholly outside United States territory in the absence of proof of intended effect in the United States.

C. Whether the Double Jeopardy Clause prohibits prosecution and conviction for two conspiracies when only one agreement is alleged and proved. The First Circuit (*U. S. v. Honneus,* 508 F.2d 566 (C.A. 1 1974), *cert. den.* 421 U.S. 948 (1975)) and the Sixth Circuit (*U. S. v. Adcock,*

487 F.2d 637 (C.A. 6 1973)) are in conflict with the Fourth (*U. S. v. Garner,* 574 F.2d 1141 (C.A. 4 1978), *cert. den.* 439 U.S. 936 (1978)), Fifth (*U. S. v. Rodriguez,* 612 F.2d 906 (C.A. 5 1980) *cert. pending*) and Ninth Circuits (*U. S. v. Marotta,* 518 F.2d 681 (C.A. 9 1975)).

D. Whether Due Process is offended by the standardless application of the "Concurrent Sentence Doctrine" to avoid determining validity of a conviction.

## 4. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

A. The Fourth Amendment to the United States Constitution provides, in part:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. * * *"

B. The Fifth Amendment to the United States Constitution provides, in part:

"* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *."

C. 14 U.S.C. § 89(a) provides, in part:

"The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes,

commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance."

D. 21 U.S.C. § 841, provides, in part:

"* * * it shall be unlawful for any person knowingly, or intentionally (1) * * * to possess with intent to * * * distribute * * * a controlled substance * * *."

E. 21 U.S.C. § 846 provides:

"*Attempt and conspiracy.* Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment proscribed for the offense, the commission of which was the object of the attempt or conspiracy."

F. 21 U.S.C. § 952 provides, in part:

"It shall be unlawful to import into * * * the United States from any place outside thereof, any controlled substance * * *."

G. 21 U.S.C. § 963 provides:

"*Attempt and conspiracy.* Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment proscribed for the offense, the commission of which was the object of the attempt or conspiracy."

## 5. STATEMENT OF THE CASE

Petitioners were arrested aboard the Texas Star, a former shrimp boat re-registered in the United States as a research vessel, in the Yucatan Straits, hundreds of miles from the United States on the High Seas. The Skipper of the Coast Guard Cutter Valiant, noticing the lack of nets and fishing equipment, decided to stop the Texas Star, board her and search for contraband. Using the ruse of a "Safety and Documentation Inspection", under 14 U.S.C. § 89a, Coast Guard and Customs Officers stopped, boarded and searched the Texas Star, found 22,590 pounds of marijuana, and arrested Petitioners and brought them to Galveston, Texas for trial. Petitioners were indicted for conspiracy to import marijuana and conspiracy to possess marijuana with intent to distribute it. The two conspiracy allegations were identical except for the alleged objects of the conspiracies. At trial there was no proof of any act committed in the United States, and no proof that Petitioners had intended or attempted to commit any acts in the United States. The Court of Appeals for the Fifth Circuit, bound by its previous decisions upholding the Coast Guard's "plenary authority," avoided ruling on Petitioners' claim that the invocation of 14 U.S.C. 89(a) was a mere pretext, on the basis that the facts known to the Coast Guard created a reasonable suspicion that the vessel was carrying contraband.

## 6. ARGUMENT

### A. First Question Presented For Review.

The Fifth Circuit's overbroad interpretation of 14 U.S.C. 89(a), that the Coast Guard may board and

search any American vessel anywhere at any time[1] under the pretext of a "Safety and Documentation Inspection" even though the real purpose is to conduct an exploratory search for contraband, violates the Fourth Amendment to the United States Constitution, and is in direct conflict with the Ninth Circuit's interpretation of 14 U.S.C. 89(a), which requires that a boarding be "for cause, requiring at least a reasonable and articulable suspicion of non-compliance, or * * * conducted under administrative standards so drafted that the decision to search is not left to the sole discretion of the Coast Guard Officer." *U. S. v. Piner,* 608 F.2d 358 (C.A. 9 1979). This conflict is particularly ripe for decision in the instant case because here the Coast Guard Officer admitted he lacked a factual basis for suspicion of illegal activity and that the reason for boarding was a "hunch", a "vague suspicion":

"Q. (By Asst. U. S. Attorney) Did you have anybody else on your boat other than Coast Guard personnel?
A. We had a U. S. Customs patrol officer.
Q. Did you have a discussion with him on the bridge prior to and in contemplation of boarding the Texas Star?
A. May I go back to the morning when the Texas Star was sighted with helicopter?
Q. Sure.
A. At the time it was sighted by helicopter I was on that flight. I went back to ship. We received information from the El Paso Intelligence Center saying they had nothing on record on the Texas Star. Therefore, having seen from the helicopter, our suspicion was not aroused. Mr. Graham [the Customs Officer], however, mentioned something

1. *U. S. v. Warren,* 578 F.2d 1058 (C.A. 5 1978); *U. S. v. Postal,* 589 F.2d 862 (C.A. 5 1979).

to me. He thought he had read something in his file or memory, very vague, that the Texas Star might be worth boarding. That is really all. He told me that in the morning after I got back from the flight.

Later in the afternoon when we were getting closer to the Texas Star the officer on deck asked if I would like to converge on it, I said, yes, sir, I think I would. Then I asked Mr. Graham again, 'What do you think? Do you think they are worth boarding?' He said, 'I think so'. It was really a hunch on his part, as I interpreted.

Q. Nothing he told you concerning the Star or any personnel on board?
A. Correct, *vague suspicion.*
Q. Vague suspicion?
A. Vague suspicion.
Q. Did you order a boarding party aboard the Texas Star?
A. Yes, I did. (R. 1st Supp. Vol. 1, pp. 65-66, Motion to Suppress, Direct Examination of Commander Lawrence, emphasis added.)"

The trial court found that a Customs Officer on board the Valiant had a "well-founded suspicion" that the Texas Star was engaged in drug smuggling. The Customs Officer had testified, however:

"Q. Would you state your name please?
A. Harold Graham.
Q. Mr. Graham, you are an Enforcement Officer with the Customs Bureau?
A. Yes.
Q. During the Valiant's cruise, which ended about the Easter Sunday of 1978, in March—the late part of March, 1978—you were aboard the Valiant, weren't you.
A. Yes.

Q. The purpose of being aboard was for law enforcement, smuggling investigation? Is that correct?
A. More in an advisory type capacity.
Q. An advisory capacity?
A. Yes.
Q. You were not there to conduct safety inspections of the boat, were you?
A. No, sir.
Q. Or compliance with Coast Guard regulations as to safety regulations?
A. No, sir.
Q. In fact, you would probably be lost if it came to trying to inspect the boat for that purpose, wouldn't you?
A. Yes.
Q. Now you were on board on the morning of the 23rd of March when the Texas Star was first sighted by helicopter, weren't you?
A. Yes.
Q. You were not aboard the helicopter, but you were aboard the Valiant?
A. Yes, sir.
Q. Some mention was made to you by Commander Lawrence that the Texas Star, among others, had been sighted?
A. Yes, sir.
Q. And radio transmissions were conducted to determine through law enforcement computers—particularly the El Paso information center—as to whether there was any information in any of the law enforcement computers concerning prior illegal activity on the part of the Texas Star or its crew members?
A. As far as I know, yes, sir.
Q. You were familiar with the procedures and found out that information using that computer, weren't you?
A. Yes.

Q. When the information came back from that computer, it came back that *there was no prior information of any sort of smuggling activities or any other sort of illegal activity on the part of the Texas Star? Is that correct?*
A. *Yes.*
Q. So then, at least, before the afternoon flight of the helicopter on the 23rd, there was no information of any sort of illegal or suspicious activity on the part of the Texas Star that you knew about, is that correct?
A. Say that again.
Q. At least, before the afternoon flight of the helicopter on the 23rd of March, there was no information that you knew about, through the computer or any other source, about the Texas Star being involved in any illegal activities?
A. I mentioned it to the captain when he came back from the morning flight.
Q. You mentioned what to the captain?
A. That I had suspicioned that perhaps this vessel may be involved in some illegal activity.
Q. I realize, and recognize that all law enforcement officers are inherently suspicious of practically everything. *Other than that general suspicion, did you have any information—that is, facts known to you—regarding the Texas Star?*
A. *No, sir.*
Q. All right. You were suspicious, but that was just because you are a law enforcement officer and it is healthy to be suspicious? Is that correct?
A. Probably.
Q. After the afternoon flight between the Texas Star was again seen, there was nothing additional, nothing known to you or known to any of the officers that you know about concerning any illegal activities of the Texas Star?
A. That is correct.

Q. When there was a conference between yourself and Commander Lawrence and, perhaps others, about whether to board the Texas Star, you were not able to provide Commander Lawrence with any hard facts, any information about illegal activities on the part of the Texas Star or its crew members, were you?
A. No, sir.
Q. Now, did you go aboard the Texas Star with the boarding party?
A. Yes.
Q. And the purpose for you going aboard was because you wanted to see if there was any contraband aboard?
A. No, sir.
Q. Were you there to conduct a safety inspection?
A. I was accompanying the Coast Guard, sir. While I am out there I make all the boardings with them and if they find something they turn to me for advice.
Q. Wasn't the decision made to board the Texas Star to see whether there was contraband aboard?
A. I don't know exactly why the captain wanted to board, sir. I was told he was going to board it to check for Coast Guard violations.
Q. I realize that was the explanation offered as a reason for boarding, but *wasn't a decision made in your presence with Commander Lawrence to board the Texas Star to see if there was contraband aboard?*
A. *I guess it could be, yes, sir.*
Q. In that conference, in that discussion with Commander Lawrence, didn't you tell him that you thought you remembered something about the Texas Star?
A. Yes, sir.
Q. But you just couldn't say what it was?
A. Yes, sir.

Q. And that was your state of mind? You thought you remembered something, but you couldn't remember what it was?
A. Yes, sir. (R. 1st Supp. Vol. 3, pp. 8-14, Suppression Hearing, emphasis added.)"

Thus, it is clear that the trial court's finding of reasonable or founded suspicion was contrary to the evidence.

The Court of Appeals further clouded the issue when it avoided addressing Petitioners' complaint about pretextual search:

> "Defendants initially challenge the introduction of evidence seized from the Texas Star and incriminating statements made after the stop of the vessel. As defendants recognize in their brief, the Coast Guard has plenary authority to stop and board an American vessel on the high seas for a safety and document inspection as it did here. See 14 U.S.C. § 89 (a); *United States v. Warren,* 578 F.2d 1058 (5th Cir. 1978) (en banc). The Texas Star was registered under the laws of the United States and was, therefore, subject to this authority.
>
> "Defendants argue, however, that the real reason for the search was to uncover contraband and that the Coast Guard's invocation of its section 89(a) safety and document check authority was pretextual. Even accepting that characterization of the stop and boarding, we need not determine whether it would distinguish this case from *Warren,* supra, for *the district judge concluded that the facts known to the Coast Guard created a reasonable suspicion that the vessel was carrying contraband to the United States. We agree and conclude that the stop and boarding was, therefore, justified.* See *United States v. Serrano,* 607 F.2d 1145 (5th Cir. 1979); *United States v. Kleinschmidt,* 596 F.2d 133 (5th Cir. 1979), *cert.*

> *denied,* ____U.S.____, 100 S.Ct. 267, 62 L.Ed.2d 184." *U. S. v. Mann,* 615 F.2d 668, at p. 670 (C.A. 5 1980).

In the first place, Petitioners only acceded that Fifth Circuit decisions characterized 14 U.S.C. § 89(a) as "plenary authority"; they did not and do not believe such interpretation is correct. Rather, Petitioners agree with the Ninth Circuit that a boarding "must be for cause, requiring at least a reasonable suspicion of noncompliance, or must be conducted under administrative standards so drafted that the decision to search is not left to the sole discretion of the Coast Guard Officer." *U. S. v. Piner,* 608 F.2d 358, 361 (C.A. 9 1979).

Secondly, the cases relied upon by the Fifth Circuit, *U. S. v. Serrano* and *U. S. v. Kleinschmidt,* both involved investigatory stops in U. S. territorial waters pursuant to Customs authority, 19 U.S.C. § 1581(a), not a general exploratory search under a ruse hundreds of miles away from the U. S.

Thus are the questions squarely presented here:

> the Coast Guard make random contraband searches of U. S. vessels on the high seas, without probable cause or reasonable suspicion, under the pretext of a 'safety and documentation inspection' authorized by 14 U.S.C. 89(a)?
>
> Does such a search violate the Fourth Amendment?
>
> Is the Fifth Circuit's interpretation of 14 U.S.C. 89(a) as 'plenary authority' overbroad and inconsistent with the Fourth Amendment?

Petitioners agree with the dissenting opinion of Circuit Judge Fay in *U. S. v. Warren,* 578 F.2d 1058, 1079-

1086 (C.A. 5 1978). Here the purported authority of 14 U.S.C. 89(a) was a ruse. Petitioners' Fourth Amendment rights were violated. The Supreme Court should overrule *U. S. v. Warren* and the other Fifth Circuit cases allowing "plenary authority" to the Coast Guard, thus reconciling the conflict between the Fifth and Ninth Circuits. The Fourth Amendment protections of a U. S. citizen do not arbitrarily end at the 12 mile limit. In order to board and search a U. S. vessel, U. S. authorities should have a warrant, or at the least a factual basis for believing a crime has been or is being committed.

**B. Second Question Presented For Review.**

The Court of Appeals held in this case for the first time:

> "* * * the district court had jurisdiction to try the defendants for a conspiracy aimed at violating United States law and intending effects in its territory even in the absence of proof of an overt act committed within this country." *U. S. v. Mann,* supra at p. 671.

Earlier, in *U. S. v. Perez-Herrera,* 610 F.2d 289 (C.A. 5 1980) another panel of the Fifth Circuit held that a person may be convicted of attempted smuggling where no act took place in the United States, stating:

> "We conclude that the realities of drug smuggling are such that Congress must have intended section 963 [21 U.S.C. § 963, Attempt to Import Marijuana] to apply in the context of this case." *Ibid* at p. 292.

even though it recognized that:

> "Congress did not address the precise issue before us * * *." *Ibid* at p. 963.

Presuming the intent of Congress violates the well established principle of lenity in construing criminal statutes. Cf. *Bifulco v. U. S.*, ____U.S.____, 27 Cr. L. 3173 (#79-5010, June 16, 1980).

The Supreme Court said in *Ladner v. U. S.*, 358 U.S. 169, 178 (1958):

> "[The] policy of lenity means that the court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."

Congress omitted any reference to extra-territorial acts being punishable under the specific statutes alleged in the indictment, 21 U.S.C. § 841, 846, 952 & 963. However, Congress specifically included a reference to extra-territorial acts in 21 U.S.C. § 959:

> "This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States."

The inclusion of this specific language as to one section of Chapter 13, and the exclusion of it elsewhere, indicates Congressional intent to be contrary to that inferred by the Court of Appeals below, and that Congress' failure specifically to authorize conviction for extra-territorial acts in Sections 841, 846, 952 and 953

> "* * * was not a slip of the legislative pen, nor the result of inartful draftsmanship, but was a conscious and not irrational legislative choice. * * * Of course, to the extent that doubts remain, they must be resolved in accord with the rule of lenity." *Bifulco v. U. S.*, ____U.S.____, 27 Cr. L. 3173, 3177 (#79-5010, June 16, 1980).

Here the indictment alleged intended effect within the United States (conspiracy to import), and inferred effect within the United States (conspiracy to distribute) but no facts were pleaded or proved that Petitioners acted, intended to act, or intended their acts to have effect, within the United States. The Fifth Circuit's extension of the statutes here to reach extra-territorial acts is not authorized by the Statute.

**C. Third Question Presented For Review.**

The Fifth Circuit rule that a single agreement may be prosecuted as two conspiracies in one proceeding violates the Double Jeopardy Clause of the Fifth Amendment. The Circuits are in conflict on this point. Holding against multiple convictions for the same agreement are the First Circuit, *U. S. v. Honneus,* 508 F.2d 566 (C.A. 1 1974), *cert. den.* 421 U.S. 948 (1975) and the Sixth Circuit, *U. S. v. Adcock,* 487 F.2d 637 (C.A. 6, 1973). Allowing double punishment are the Fourth Circuit, *U. S. v. Garner,* 574 F.2d 1141 (C.A. 4, 1978) *cert. den.* 439 U.S. 936 (1978), the Fifth Circuit, *U. S. v. Rodriguez,* 612 F.2d 906 (C.A. 5, 1980) *cert. pending,* and the Ninth Circuit, *U. S. v. Marrotta,* 518 F.2d 681 (C.A. 9, 1975).

In the instant case two identical conspiracies were alleged, conspiracy to import marijuana (21 U.S.C. 952 & 963) and conspiracy to possess marijuana with intent to distribute it (21 U.S.C. 841 & 846). The same overt acts were alleged and, in short, only one agreement was proved. The Court of Appeals made short shrift of Petitioners' double jeopardy argument:

> "Defendants argue that, even though the evidence may support convictions for both conspiracies, there

> was but a single agreement and a double conviction violates double jeopardy. The argument was settled when this court en banc held that the conviction and punishment in one proceeding of a single conspiracy under two specific conspiracy statutes does not violate the double jeopardy clause. *See United States v. Rodriguez,* 612 F.2d 906 (5th Cir. 1980) (en banc) *But see id.* at 925 (Rubin, J., dissenting). *U. S. v. Mann, supra* at p. 670.

Petitioners agree with Circuit Judge Rubin's dissent in *Rodriguez*:

> "The offense of conspiracy lies in the agreement alone. *United States v. Alvarez,* 610 F.2d 1250 (5th Cir. 1980); *United States v. Suarez,* 608 F.2d 584 (5th Cir. 1979); *see United States v. Falcone,* 109 F.2d 579 (2d Cir.) *aff'd,* 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940). It 'is an inchoate offense, the essence of which is an agreement to commit an unlawful act.' *Iannelli v. United States,* 420 U.S. 770, 777, 95 S.Ct. 1284, 1289, 43 L.Ed.2d 616, 622 (1975); accord, *United States v. Conroy,* 589 F.2d 1258, 1269 (5th Cir.), *cert. denied,* ____U.S. ____, 100 S.Ct. 60, 62 L.Ed.2d 40 (1979).
>
> "As the majority opinion makes clear, the defendants were charged with entering into one agreement, and only one agreement was proved; that agreement had two objectives, importing marijuana and distributing it. Though the charge described overt acts, it was unnecessary for the prosecution to charge or to prove any act in furtherance of the conspiracy (majority opinion, n.37 *supra*) and, therefore, according to the majority's opinion, the single agreement itself constituted two crimes, punishable twice, the instant there was assent, whether express or by wink or handshake, and whether or not anything further was ever done to accomplish the illicit bargain. For that one agreement, the defendants were

charged with violating two separate provisions enacted by a single law, convicted of violating both and sentenced to separate and consecutive sentences.

"I respectfully disagree with what seems to me to be both an erroneous conjecture of the unarticulated purpose behind enactment of the statute and failure to grant the defendants the protection of the double jeopardy clause." *U. S. v. Rodriguez, supra,* at p. 425 (footnotes omitted).

Application for writ of certiorari is presently pending in *U. S. v. Rodriguez, supra.* The Supreme Court should resolve the conflict among the circuits and prohibit multiple count prosecutions for the same agreement.

**D. Argument.**

The Court of Appeals declined full review of Petitioners' dual convictions by invoking the "Concurrent Sentence Doctrine". Evidence to support both conspiracy convictions is seriously deficient, but because Petitioners eventually received concurrent sentences, the Court of Appeals refused to review the sufficiency of the conviction for conspiracy to possess with intent to distribute. As in the panel opinion in *U. S. v. Rodriguez,* 585 F.2d 1234 (C.A. 5 1978), undisturbed by the en banc opinion, here there was no evidence that Petitioners intended to be involved in a distribution scheme once the marijuana was imported:

"The direct and circumstantial evidence that they were peripheral participants in the importation scheme does not refute, beyond a reasonable doubt, the hypothesis that they had no knowledge of a conspiracy to distribute it once it reached these shores. * * * Although they may be charged with

knowledge that such a scheme would likely be formed once the haul arrived, this is not sufficient to exclude, beyond a reasonable doubt, that they did not then either join in it or even know of it." *U. S. v. Rodriguez,* 585 F.2d at p. 1247.

Petitioners will suffer adverse collateral consequences even though their sentences are concurrent. Petitioners adopt the dissenting opinion of Circuit Judges Roney, James C. Hill, Clark, Fay and Vance in *U. S. v. Warren,* 612 F.2d 887 (C.A. 5 en banc 1980) regarding such consequences and guidelines which should be adopted in applying the concurrent sentence doctrine:

"* * * The following are guidelines under which defendants contend their concurrent convictions should be reviewed:

"*First,* the concurrent sentence doctrine should not preclude review of clearly invalid convictions. *See United States v. Evans,* 572 F.2d 455, 476-77 (5th Cir.), *cert. denied,* 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978). Judicial resources are not substantially depleted if reversal of the convictions is mandated by clear precedent.

"*Second,* if there is a reasonable possibility that the reviewed convictions will be reversed in subsequent proceedings, the concurrent sentence doctrine should not foreclose review of other convictions. *See Benton v. Maryland,* 395 U.S. 784, 792-93, 89 S.Ct. 2056, 2061, 23 L.Ed.2d 707 (1969).

"*Third,* if the reviewed conviction was substantially affected by a legal issue raised in the concurrent appeal, the concurrent sentence doctrine should not be applied. In this case, defendants contend that probable cause for the search which led to their marijuana conspiracy convictions depended in part on the validity of the unreviewed currency convic-

tions, see *United States v. Warren*, 578 F.2d at 1084-85 n. 6 (Fay, J., dissenting), a contention rejected by both en banc opinions, 578 F.2d at 1077 n. 17, and ante, at 889 n. 2.

"*Fourth*, the concurrent sentence doctrine should not apply if there is 'any possibility' that the defendant will suffer adverse collateral consequences from the conviction. *See United States v. Tanner*, 471 F. 2d 128, 140 (7th Cir.), *cert. denied*, 409 U.S. 949, 93 S.Ct. 269, 34 L.Ed.2d 220 (1972). They assert the following adverse collateral consequences could flow from their convictions:

"1. *Parole.* The convictions may have a detrimental impact on parole opportunities. *See United States v. Rubin*, 591 F.2d 278 (5th Cir.), *cert. denied*, ____U.S.____, 100 S.Ct. 133, 62 L.Ed.2d 87 (1979).

"2. *Impeachment.* These convictions might subject defendants to impeachment as witnesses in subsequent civil or criminal proceedings. *See Benton v. Maryland*, 395 U.S. at 791, 89 S.Ct. at 2060; *Government of Canal Zone v. Castillo*, 568 F.2d 405, 406 (5th Cir.), *cert. denied*, 436 U.S. 910, 98 S.Ct. 2248, 56 L.Ed.2d 410 (1978). Under Fed. R. Evid. 609(a)(2), even though the conspiracy convictions might not be usable at trial, defendants contend they could be impeached in a federal court with the currency convictions because those convictions might be viewed as involving 'dishonesty or [a] false statement.'

"3. *Enhancement of sentence in future convictions.* The convictions could have the consequence of enhancing a subsequent sentence by operation of a recidivist statute.

"Defendants propose the following additional guidelines for the application of the concurrent sen-

tence doctrine which would not apply to the circumstances of their convictions:

"The concurrent sentence doctrine should not preclude review of a conviction if there exists a reasonable possibility that the sentence on the reviewed and affirmed convictions was enhanced because of the multiple convictions. *See Sanders v. United States,* 541 F.2d 190, 194 (8th Cir. 1976), *cert. denied,* 429 U.S. 1066, 97 S.Ct. 796, 50 L.Ed.2d 784 (1977).

"Nor should it apply if there is a reasonable possibility that evidence admitted on one conviction, and admissible only as to that conviction, affected the finding of guilt on the reviewed and affirmed conviction. *See United States v. Darnell,* 545 F.2d 595, 598 (8th Cir. 1976), *cert. denied,* 429 U.S. 1104, 97 S.Ct. 1134, 51 L.Ed.2d 556 (1977).

"They advance three additional adverse collateral consequences which could flow from a conviction:

"1. Stigma. Although any criminal conviction is likely to be stigmatizing to some extent, defendants refer to the approbation attaching to particular types of crime. *See United States v. Thomas,* 148 U.S. App. D.C. 148, 151-52, 459 F.2d 1172, 1175-76 (D.C. Cir. 1972) (cruelty to a child).

"2. Deportation. Because an alien may be deported if "convicted of two crimes involving moral turpitude," 8 U.S.C.A. § 1251(a)(4), review of a conviction which would count toward that threshold is essential.

"3. Forfeiture. Although it is not now a factor in this case because of a stipulation with the Government, a forfeiture of property, employment opportunities or civil rights may often be a collateral consequence of a conviction. *See United States v. Farrell,* 609 F.2d 816, 817-818 (5th Cir. 1980);

*Ivers v. United States*, 581 F.2d 1362, 1366-67 (9th Cir. 1978)."

Presently no guidelines exist. The "concurrent sentence doctrine" is applied as a rule of convenience and as such denies Due Process of Law.

## 7. CONCLUSION AND PRAYER

For the reasons stated, the Supreme Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

FOREMAN, DEGUERIN & DEGEURIN

DICK DEGUERIN
*Attorney for Petitioners*
609 Fannin, Suite 1111
Houston, Texas 77002
(713) 224-9321

## CERTIFICATE OF SERVICE

I, Dick DeGuerin, hereby certify that five printed copies of the above and foregoing Petition for Writ of Certiorari were served upon the Office of the United States Attorney for the Southern District of Texas, 515 Rusk Avenue, Houston, Texas 77002 by placing same in the United States Mail, postage prepaid on the _____ day of June, 1980.

DICK DEGUERIN

## APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Steven MANN, Dennis McLaughlin, Marc Schulman and Bruce Cunningham,
Defendants-Appellants.

No. 79-5165

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

April 17, 1980.

Defendants were convicted before the United States District Court for the Southern District of Texas, at Galveston, Finis E. Cowan, J., of conspiracy to import marijuana, conspiracy to possess marijuana with intent to distribute, and carrying firearms in commission of a felony, and they appealed. The Court of Appeals held, inter alia, that: (1) Coast Guard's stopping and boarding of defendants' American vessel on the high seas was justified by the facts known to the Coast Guard which created a reasonable suspicion that the vessel was carrying contraband to the United States; (2) once Coast Guard customs officer was aboard defendants' vessel, the odor of marijuana in the engine room and the presence of weapons justified the Coast Guard in taking further steps to ascertain the nature of the cargo the vessel

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* Fed. R. App. P. 34(a); 5th Cir. R. 18.

carried; but (3) carrying a weapon on the high seas is not unlawful.

Affirmed in part and reversed and remanded in part.

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Dick DeGuerin, Houston, Tex., for defendants-appellants.

James R. Gough, John M. Potter, Asst. U.S. Attys., Houston, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before GEE, RUBIN and POLITZ, Circuit Judges.

PER CURIAM:

Now well-established principles relating to stopping and searching U. S. vessels on the high seas are involved in the appeal of this criminal conviction after a jury trial on three counts, conspiracy to import marijuana, 21 U.S.C. § 963, conspiracy to possess marijuana with intent to distribute it, 21 U.S.C. § 846, and carrying firearms in the commission of a felony, 18 U.S.C. § 924(c)(2). We affirm the conspiracy convictions, but reverse the firearms conviction on the ground that it is not unlawful to carry firearms on the high seas.

The four defendants, Mann, McLaughlin, Cunningham, and Schulman were arrested aboard a U. S. registry vessel on the high seas off the Yucatan Peninsula. The vessel, Texas Star, a shrimper owned by a Texas corporation, Interstate Exploration, Inc., was travelling in the direction of the Texas coast when Coast Guard officers observed her from a helicopter, and noted her course and speed. They communicated with the crime information

center in El Paso, Texas, but the center had no information regarding the vessel. However, she was headed toward Texas, was not rigged for shrimping, carried no shrimp nets, was not on waters usually fished for shrimp and the Coast Guard saw no one aboard engaged in fishing activity. Therefore, the Coast Guard officer aboard the helicopter's base vessel, the Valiant, decided to board the Texas Star, ostensibly for a safety and document inspection. The officer in charge of the boarding party told those aboard that he was checking for compliance with U.S. laws and whether there were guns aboard. Mann said there were weapons on the ship and produced an AR 15 semi-automatic rifle and a shotgun. The vessel's papers showed that 19 days previously she had been boarded by the Captain of the Port of Galveston and his inspection revealed that the pollution plaque was not in the engine room.

The Coast Guard officer went to the engine room to see whether the discrepancy had been corrected. En route he smelled what he thought to be marijuana. There were burlap covered bags in the room so he asked about their contents. Mann said the cargo was bauxite. The Coast Guard officer opened some of the bags, found marijuana and gave the defendants *Miranda* warnings. The Coast Guard party then searched the vessel and discovered 22,590 pounds of marijuana, two .22 caliber pistols, a shotgun and 980 rounds of ammunition.

Mann and McLaughlin thereafter made incriminating statements that were used against them at the trial. Seven issues are raised on appeal. We deal separately with defendants' challenges of the conspiracy convictions, the firearms convictions and the sentences of defendants Mann and McLaughlin.

I.

[1, 2] Defendants initially challenge the introduction of evidence seized from the Texas Star and incriminating statements made after the stop of the vessel. As defendants recognize in their brief, the Coast Guard has plenary authority to stop and board an American vessel on the high seas for a safety and document inspection as it did here. *See* 14 U.S.C. § 89(a); *United States v. Warren,* 578 F.2d 1058 (5th Cir. 1978) (en banc). The Texas Star was registered under the laws of the United States and was therefore, subject to this authority.

[3] Defendants argue, however, that the real reason for the search was to uncover contraband and that the Coast Guard's invocation of its section 89(a) safety and document check authority was pretextual. Even accepting that characterization of the stop and boarding, we need not determine whether it would distinguish this case from *Warren, supra,* for the district judge concluded that the facts known to the Coast Guard created a reasonable suspicion that the vessel was carrying contraband to the United States. We agree, and conclude that the stop and boarding was, therefore, justified. *See United States v. Serrano,* 607 F.2d 1145 (5th Cir. 1979); *United States v. Kleinschmidt,* 596 F.2d 133 (5th Cir. 1979), cert. denied, ____U.S.____, 100 S.Ct. 267, 62 L.Ed.2d 184.

[4] Once the customs officer was aboard, the odor of marijuana in the engine room and the presence of weapons justified the Coast Guard in taking further steps to ascertain the nature of the cargo the vessel carried. *United States v. Warren,* 578 F.2d 1058 (5th Cir. 1978) (en banc); *United States v. Conroy,* 589 F.2d 1258 (5th Cir. 1979). Thus, whether the stop was intended to be only

for safety and document inspection or whether it was designed to seek signs of illegal cargo, it was constitutional.

[5] Defendants challenge the sufficiency of the evidence to support the conclusion that they intended to distribute the contraband cargo. The defendants were apprehended with over 22,500 pounds of marijuana in their possession, far too much for the personal consumption of four individuals. Having determined that defendants planned to import their cargo, the jury was entitled to infer from the facts before it that some plan had been made for its disposition. As we have previously noted "[t]he very size of a . . . cache can be sufficient to show intent to distribute . . ." *United States v. Rodriguez,* 585 F.2d 1234, 1246 (5th Cir. 1978), *aff'd* 612 F.2d 906 (5th Cir. 1980) (en banc); *United States v. Perry,* 480 F.2d 147 (5th Cir. 1973); *United States v. Mather,* 465 F.2d 1035 (5th Cir.) *cert. denied,* 409 U.S. 1085, 93 S.Ct. 685, 34 L.Ed.2d 672 (1972).

[6] Defendants argue that, even though the evidence may support convictions for both conspiracies, there was but a single agreement and a double conviction violates double jeopardy. The argument was settled when this court en banc held that the conviction and punishment in one proceeding of a single conspiracy under two specific conspiracy statutes does not violate the double jeopardy clause. *See United States v. Rodriguez,* 612 F.2d 906 (5th Cir. 1980) (en banc) *But see id.* at 925 (Rubin, J., dissenting).

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[7-9] The defendants' final attack on the conspiracy convictions challenges the jurisdiction of the court because of the failure of the government to prove any overt act

within the United States in furtherance of the conspiracy. It is not necessary for the government to allege or prove an overt act to obtain convictions under the controlled substance conspiracy statutes. *See United States v. Rodriguez,* 612 F.2d 906, 919 n. 37 (5th Cir. 1980) (en banc). The district court was not divested of jurisdiction of the offense because the government failed to do what it was not required to do. "The nation has long asserted the objective view, under which its jurisdiction extends to persons whose acts have an effect within the sovereign territory even though the acts theselves occur outside it." *United States v. Cadena,* 585 F.2d 1252 (5th Cir. 1978). When a conspiracy statute does not require proof of overt acts, the requirement of territorial effect may be satisfied by evidence that the defendants intended their conspiracy to be consummated within the nation's borders. *See United States v. Postal,* 589 F.2d 862, 886 n. 39 (5th Cir. 1979). Any other rule would place the United States in the anomalous position of being prohibited from apprehending and punishing those who plan to violate its laws until after the plan has taken fruit within its territorial boundaries. Thus, although Congress may have intended to strike at crimes and conspiracies begun outside the United States, it could not do so until they had some internal effect. Such a rule would not only make enforcement of our laws increasingly difficult, it would also conflict with the purpose of the objective view of jurisdiction. We, therefore, conclude that the district court had jurisdiction to try the defendants for a conspiracy aimed at violating United States law and intending effects in its territory even in the absence of proof of an overt act committed within this country.

## II.

Defendants challenge their convictions for unlawfully carrying firearms in the course of a felony. 18 U.S.C. § 924(c)(2). "Section 924(c)(2) is violated only if the act of carrying the firearm is in and of itself a violation of federal, state or local law." *United States v. Bower*, 575 F.2d 499, 501 (5th Cir. 1978). Defendants contend that there was no proof that their possession of weapons violated any federal, state or local law; we agree.

The government does not argue that carrying a weapon aboard a vessel on the high seas is itself illegal. To establish that carrying the firearms was unlawful it relies upon several provisions of both state and federal law.

[10] None of the statutes we are referred to by the government makes illegal the conduct here—carrying a weapon on the high seas. Several of the statutes make the carrying of weapons within the territorial boundaries of a state illegal, *e.g.*, Tex. Pen. Code § 46.02(a); L.S.A.-R.S. 14.95(A)(1); however, there is no proof that defendants had the weapons in their possession while they were in Texas and Louisiana. Had the defendants carried the weapons into Texas on their return, they would have violated federal prohibitions on the transporting and importation of firearms. The charge is not a conspiracy to violate the firearms statute, whatever the basis for such a charge might be, but possession of the firearms. The record contains no evidence that defendants' possession of the weapons seized from the Texas Star was unlawful. Therefore, the convictions under 18 U.S.C. § 924(c)(2) must be reversed.[1]

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1. We note that, in his instructions to the jury, the judge neglected to charge that the carrying of the firearm must be unlawful.

III.

At the sentencing hearing, the judge stated that he believed that Schulman and Cunningham had no knowledge of the identity of the backers of the drug scheme, and he sentenced them to twelve months with a six-year special parole term. The judge further stated that he did not believe the testimony of Mann and McLaughlin that they had no useful information to provide to the government and did not know of the identity of their financial backers, and he found them neither repentant nor determined to avoid similar action in the future. He then stated his intention to impose the maximum penalty of five years on Counts 1 and 2 and ten years on Count 3, running consecutively for a total of twenty years and a $30,000 fine. However, the judge invited their attorney to move for reduction of sentence.

Following the filing of the motion, and counsel's argument that punishment cannot be enhanced for refusal to provide information, the court reduced the sentences of these two defendants to five years on Count 1, five years on Count 2, and seven and one half years on Count 3, all sentences to run concurrently.

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Although the unlawfulness of the defendants' possession of firearms might be viewed as a question of law, *United States v. Rivero*, 532 F.2d 450, 458-59 (5th Cir. 1976), in this case a resolution of the question would depend upon the presence of facts establishing that the defendants were carrying the firearms while inside the United States. We have concluded that there was insufficient evidence to support such a conclusion. However, even if the evidence in the record could support that inference, the charge to the jury did not require them to find such facts before returning a verdict of guilty. Thus, it is likely that the jury returned a guilty verdict on Count III on the basis of facts which did not establish that the defendants were *unlawfully* carrying firearms. We cannot assume that the jury determined factual issues against the defendants which, on the charge given, it did not need to determine before returning a verdict.

[11-13] While a court may not punish a defendant who refuses to provide information to the government, *see United States v. Wright,* 533 F.2d 214, 216 (5th Cir. 1976), it may consider a number of factors including truthfulness. *See United States v. Grayson,* 438 U.S. 41, 50-51, 98 S.Ct. 2610, 2616, 57 L.Ed.2d 582 (1978); *United States v. Richardson,* 582 F.2d 968, 969 (5th Cir. 1978). The reduction of the original sentence reflects an appropriate reconsideration of the judge's initial resolve and an elimination of the possible presence of improper motive. The fact that the two other defendants received lesser sentences is irrelevant. *See United States v. Hayes,* 589 F.2d 811 (5th Cir. 1979). Mann and McLaughlin appeared to the district judge not only to be the masterminds of the criminal scheme but also to be less truthful and less repentant than their confederates. The assessment of a lengthier prison term for those two was within his discretion.

Accordingly, the convictions are REVERSED on Count 3 and AFFIRMED on all other counts. This case is REMANDED to the district court for resentencing.

## APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 79-5165

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

STEVEN MANN, DENNIS McLAUGHLIN,
MARC SCHULMAN and BRUCE CUNNINGHAM,
Defendants-Appellants.

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Appeal from the United States District Court for the
Southern District of Texas

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(MAY 27, 1980)

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ON PETITION FOR REHEARING

(Opinion, April 17, 1980, 5 Cir., 1980 ____F.2d____)

Before GEE, RUBIN and POLITZ, Circuit Judges.

PER CURIAM:

The petition for rehearing is denied. We need not review the contention that our affirmance of the conviction on count 2 of the indictment, conspiracy to distribute marijuana, was erroneous because, in any event, the

sentence on count 2 will run concurrently with the sentence on count 1, conspiracy to import marijuana. *See United States v. Ortiz,* 610 F.2d 280, 282-83 (5th Cir. 1980). It is not suggested that the conviction on count 2 will have adverse collateral consequences. *See United States v. Rubin,* 591 F.2d 278, 280 (5th Cir. 1979). Our own review of the Parole Commission Guidelines reveals that the offense behavior here will receive the same severity rating and have the same impact on defendants' parole possibilities whether or not this conviction stands. 28 C.F.R. § 2.20 (1979).

We note, however, that *United States v. Rodriguez,* 585 F.2d 1234, 1247 (5th Cir. 1978), *aff'd* 612 F.2d 906, 925 (5th Cir. 1980) (en banc), upon which defendants rely, specifically approved convictions for conspiracy to distribute marijuana where, as here, the amount of marijuana was too large for the personal consumption of defendants and the defendants had "sufficient dominion over or interest in the marijuana to warrant the inference" that they intend to participate in transferring it to others after they arrive in the United States.

The contention that federal criminal jurisdiction does not reach the acts involved here is without merit for the reasons expressed in our opinion.

## APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

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Criminal No. G-78-4

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UNITED STATES OF AMERICA

vs.

STEVEN MANN, DENNIS McLAUGHLIN,
MARC SCHULMAN, BRUCE CUNNINGHAM

---

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

From an unknown time and continuing up to and including March 23, 1978, on the high seas, and elsewhere, the Southern District of Texas being the first district to which the defendants were brought, the defendants STEVEN MANN, DENNIS McLAUGHLIN, MARC SCHULMAN and BRUCE CUNNINGHAM did willfully, knowingly and unlawfully combine, conspire, confederate and agree with each other and with diverse other persons to the Grand Jury unknown to commit an offense against the United States, to wit: to violate Section 952(a) of Title 21, United States Code.

It was part of said conspiracy that the defendants would knowingly and intentionally import into the United States,

from a place outside thereof, a controlled substance, to wit: approximately 22,590 pounds of marihuana, a Schedule I non-narcotic controlled substance.

The Grand Jury further charges that the defendants, in furtherance of and to effect and achieve the goals of the conspiracy, did, at or about the times and places hereinafter referred to, commit certain overt acts, which are as follows:

OVERT ACTS

1. On or about March 6, 1978, STEVEN MANN, DENNIS McLAUGHLIN, MARC SCHULMAN and BRUCE CUNNINGHAM left Galveston, Texas, aboard the vessel "Texas Star".

2. On or about March 23, 1978, on the high seas STEVEN MANN, DENNIS McLAUGHLIN, MARC SCHULMAN and BRUCE CUNNINGHAM were aboard the vessel "Texas Star" which was carrying approximately 22,590 pounds of marihuana.

(Violation: Title 21, United States Code, Section 963)

COUNT TWO

From an unknown time and continuing up to and including March 23, 1978, on the high seas, and elsewhere, the Southern District of Texas being the first district to which the defendants were brought, the defendants STEVEN MANN, DENNIS McLAUGHLIN, MARC SCHULMAN and BRUCE CUNNINGHAM did willfully, knowingly and unlawfully combine, conspire, confederate and agree with each other and with diverse other persons to the Grand Jury unknown to commit

offenses against the United States, to wit: to violate Section 841(a)(1) of Title 21, United States Code.

It was part of said conspiracy that the defendants would knowingly and intentionally possess with the intent to distribute a controlled substance, to wit: approximately 22,590 pounds of marihuana, a Schedule I non-narcotic controlled substance.

The Grand Jury further charges that the defendants, in furtherance of and to effect and achieve the goals of the conspiracy did, at or about the times and places hereinafter referred to, commit certain overt acts, which are as follows:

OVERT ACTS

1. On or about March 6, 1978, STEVEN MANN, DENNIS McLAUGHLIN, MARC SCHULMAN and BRUCE CUNNINGHAM left Galveston, Texas, aboard the vessel "Texas Star".

2. On or about March 23, 1978, on the high seas, STEVEN MANN, DENNIS McLAUGHLIN, MARC SCHULMAN and BRUCE CUNNINGHAM were aboard the vessel "Texas Star" which was carrying approximately 22,590 pounds of marihuana.

(Violation: Title 21, United States Code, Section 846)

COUNT THREE

That on or about March 23, 1978, on the high seas, and elsewhere, the Southern District of Texas being the first district to which the defendants were brought, the defendants STEVEN MANN, DENNIS McLAUGHLIN, MARC SCHULMAN and BRUCE CUNNINGHAM did

carry firearms knowingly and unlawfully during the commission of the felony offenses of conspiracy to import and conspiracy to possess with intent to distribute a controlled substance, to wit: marihuana, a Schedule I nonnarcotic controlled substance, in violation of Title 21, United States Code, Sections 963 and 846.

(Violation: Title 18, United States Code, Section 924(c)(2) and Title 18, United States Code, Section 2)

A TRUE BILL:

_____

Foreman of the Grand Jury

J. A. "TONY" CANALES
United States Attorney

By_____
RONALD G. WOODS
Assistant United States Attorney

/sgp

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

---

CRIMINAL NO. G-78-4

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UNITED STATES OF AMERICA

v.

STEVEN MANN, DENNIS McLAUGHLIN
MARC SHULMAN, BRUCE CUNNINGHAM

---

Ron Wood, Assistant U. S. Attorney,
Houston, Texas
For the United States

Dick DeGuerin, Houston, Texas
For the defendants

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## FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION

### Introduction

The defendants have been convicted for conspiring to import marijuana into the United States, conspiring to possess marijuana with intent to distribute in the United States, and carrying firearms during the commission of felony offenses.

Before trial, the court conducted a two and one-half day evidentiary hearing primarily for the purpose of determining the location of the defendants' vessel (the "TEXAS STAR") at the time of its seizure. The court has now concluded on the basis of an examination of the law, that this two and one-half day evidentiary hearing was probably unnecessary, and this opinion is prepared in part for the purpose of preventing future unnecessary expenditure of judicial time in similar cases.

The defendants, through counsel, have requested the court to make detailed findings of fact concerning the motion to suppress. This document will serve the purpose of making such detailed findings of fact.

Findings of Fact Relating
to Location of TEXAS STAR
at Time of Seizure

Defendant Mann contends, and testifies, that at the time of seizure his vessel was located approximately eight miles northeast of the tip of the Yucatan peninsula. The United States contends that the TEXAS STAR, at the time of seizure, was approximately 30 to 34 miles northeast of the tip of the Yucatan peninsula. As indicated below, the court, after a review of the authorities, has determined that this factual dispute is, and at all material times has been, immaterial. In the event the court is mistaken, and in compliance with the request of counsel for defendants, the court will here make detailed findings of fact in this factual dispute.

The court finds as a fact that the TEXAS STAR, at all times during the seizure, was more than 12 miles from the coast of Mexico, for the following reasons:

1. The officers of the Coast Guard Cutter VALIANT (hereinafter "VALIANT") have testified that at all times during the seizure their vessel was between 30 and 34 miles from the coast of Mexico. The court accepts the credibility and reliability of these officers.

2. The detailed records of the VALIANT's navigational computations support the testimony of the officers. These records were made by various persons, at various times, working under pressure. The records are not complete. There are some omissions and irregularities in the records. These irregularities and omissions are not sufficient to make this court question the credibility and reliability of these records, and the records support the testimony of the officers of the VALIANT concerning its position.

3. The uncontradicted testimony of all witnesses, including that of the defendant Steven Mann, is to the effect that the light at Cabo Catoche was not visible at any time during the seizure. The testimony of some of the Coast Guard witnesses, whom this court credits, is to the effect that the light at Cabo Catoche can be seen for 12 miles at the time of day when the seizure occurred, and that this inability to see the light at Cabo Catoche establishes a distance of greater than 12 miles from the coast of Mexico.

3. The only testimony offered by the defendants to support their contention that the TEXAS STAR was eight miles from the Mexican coast is the uncorroborated testimony of defendant Mann to the effect that he could see the coast of Mexico in his

radar screen. There is credible testimony that if the coast of Mexico could be seen in the radar screen, the TEXAS STAR would have been closer than 12 miles to the Mexico coast. There are several difficulties with Mann's testimony. First, Mann admits that at the time of his alleged observation of the radar screen, he was engaged in the commission of a felony. He admits that the explanation which he gave to the boarding party concerning his cargo was false. His credibility is thus suspect. In addition, two members of the boarding party looked at the radar immediately after the boarding, observed the blip on the radar created by the VALIANT, but did not observe on the radar any indication of the Mexican coast. Mann's testimony, therefore, in addition to being uncorroborated is directly contradicted by the testimony of the members of the boarding party who looked at the radar.

4. The position of the TEXAS STAR during the boarding was checked by both loran and celestial sighting. While there is some dispute concerning the accuracy of the loran readings, the accuracy of the celestial fix taken at 6:45 p.m., during the course of the boarding, is undisputed.

5. Any discrepancies in the records of the VALIANT concerning the reading of the fathometer may raise certain suspicions, but do not rise to the level of proof, for the reason that the evidence demonstrates that the floor of the Gulf of Mexico in this area is not completely regular, and that contour lines drawn to connect points of established depth are approximations of the depth at a precise spot and not mathematically accurate.

6. It is inherently improbable that the defendants would have subjected themselves to capture by Mexican patrol boats. There is testimony that the waters in which they were sailing are heavily patrolled by Mexican patrol boats.

7. After the seizure, at the time of the seizure, and during the fairly extensive conversations which occurred between the defendants and the crew of the VALIANT during the trip back to Galveston, there was no complaint or suggestion that the seizure had occurred within the contiguous zone of three to 12 miles off the Mexican coast. There was no complaint or question raised concerning the location or legality of the seizure at the time of the seizure.

6. The chart seized aboard the TEXAS STAR, while somewhat ambiguous and far from completely clear, would seem to indicate that the TEXAS STAR was following the same general route as that followed by Capt. Bowdin, one of the defendants' witnesses. If the TEXAS STAR was following the same general route as Capt. Bowdin, the TEXAS STAR would have been considerably more than 12 miles from the Mexican coast at the time of the seizure, and thus Capt. Bowdin's testimony, as the court views the matter, supports government's position concerning the location of the vessel.

Prior to the boarding of the vessel, a Customs officer, Mr. Graham, suspected that the TEXAS STAR might well be engaged in the smuggling of narcotics. This was a well-founded suspicion. This court is aware that no "particularized suspicion" is necessary to justify a board-

ing under 14 U.S.C. § 89(a), but in this particular case grounds would exist, in the undersigned's view, for a "particularized suspicion." The vessel was not rigged for fishing. It was obviously not engaged in fishing. It was obviously not engaged in marine research. It was neither a cargo vessel not a pleasure boat. The course of the vessel during the period when it was under observation by the VALIANT was such as to support an inference that the boat was proceeding from Columbia to the United States. Not many shrimping vessels are seen in these waters. Under this set of circumstances, it was not an unreasonable conclusion for anyone to reach that the vessel was engaged in the smuggling of narcotics.

After the boarding occurred, the boarding crew of the VALIANT was presented with documentation indicating that the TEXAS STAR had been examined previously and a deficiency, lack of a pollution placard in the engine room, had been noted. During the inspection to determine whether or not this noted deficiency had been corrected, the crew of the VALIANT noted a strong smell of marijuana and observed bags. Steven Mann stated that these bags contained bauxite, a manifest improbability in view of the appearance and odor of the bags.

The boarding of the TEXAS STAR was not a pretext but was the exercise of the Coast Guard's duty and responsibility as outlined in the statute codified at 14 U.S.C. § 89(a). Search of the vessel was not unduly intrusive, and the marijuana was in reality in plain view although stored beneath decks. The marijuana was in "plain view" for the reason that it was plainly visibly during the conduct of the normal safety and documentation inspection, and because of the odor emitted by the 22,000 pounds of marijuana.

Legal Conclusions

A review of the law reveals that the two and one-half day suppression hearing in this case was unnecessary and a substantial waste of court time, taxpayer dollars, and the dollars of whomever is financing the defense of this case. The Fifth Circuit, en banc, in the case of *United States v. Warren,* ____F.2d____ (5th Cir. August 24, 1978) explained succinctly in footnote 4 that the term "high seas" includes seas which lie seaward of the territorial sea and encompasses both the contiguous zone and the area beyond the contiguous zone. The Court of Appeals said:

> This 12-mile limit includes the territorial sea, which extends to three miles from the coast, and the contiguous zone, which extends from three to 12 miles from the coast. The United States exercises plenary powers over the territorial sea, subject to the requirement that the passage of foreign vessels may not be interfered with unreasonably. *See* Carmichael, *At Sea with the Fourth Amendment,* 32 Miami L. Rev. 51, 56-57 (1977). The power of the United States over foreign vessels in the contiguous zone is limited to the preservation of specific interests, e.g., the enforcement of customs and safety laws. *See id.* at 58.
>
> The high seas lie seaward of the territorial sea and thus encompass the contiguous zone. Although vessels on the high seas are subject to the powers exercised over the contiguous zones and certain safety, navigation, pollution, piracy, and slave-trade regulations, no country may assert sovereignty over the high seas. *See id.* . . . To maintain order on the high seas, therefore, each nation is charged with the duty of policing its own vessels. Convention on the High Seas, art. 10, 13 U.S.T. at 2316. It was in the performance of this duty, pursuant to the authority of

> § 89, that the Coast Guard boarded the *Stormy Seas* some 700 miles at sea.

The Convention on the High Seas, September 30, 1962, art. 10, says:

> The term "high seas" means all parts of the sea that are not included in the territorial sea or in the internal waters of the state.

The statute codified at 14 U.S.C. § 89(a) (1976) clearly provides that the Coast Guard has authority to make inspections, searches and seizures ". . . upon the high seas and waters over which the United States has jurisdiction . . ."

Whether the TEXAS STAR was eight miles from the Mexican coast, or 30 miles from the Mexican coast, it was still on the high seas and the Coast Guard still had full authority to inspect the vessel, and, upon discovery of the marijuana, make a search, seizure and arrest.

In addition, there is another cogent reason why the detailed suppression hearing in this case was totally unnecessary. The purpose of the Fourth Amendment is to protect persons who have some reasonable expectation of privacy in the premises which they are occupying. It is manifestly absurd to contend that the defendants had a reasonable expectation of privacy if they were 11.9 miles from the Mexican, but no reasonable expectation of privacy if they were 12.1 miles from the Mexican coast.

While no cases precisely in point have been discovered, it is elementary that a person with no expectation of privacy or interest in the premises may not complain of an illegal search. See *Brown v. United States*, 411 U.S.

223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973). Defendants had no reasonable expectation of privacy in Mexican waters, even if they had been in Mexican territorial waters. Defendants certainly had no "possessory interest" of any kind in Mexican contiguous waters or the Mexican territorial sea. It therefore appears to the court that under the doctrine followed in *Brown v. United States* and applied by the Fifth Circuit in the cases cited *infra*, defendants have no standing to complain of the search, seizure and arrest of the TEXAS STAR, even if they were located within the Mexican territorial sea and certainly when they were merely located within the Mexican contiguous waters by the testimony of their own witness, defendant Mann.

While no case directly in point has been located, this court believes that the finding of lack of standing to challenge the search, seizure and arrest of the vessel is supported by the philosophy of the following Fifth Circuit cases: *United States v. Dyer,* 574 F.2d 1385 (5th Cir. 1978); *United States v. Archbold-Newball,* 554 F. 2d 665 (5th Cir. 1977); *United States v. Holmes,* 537 F.2d 227 (5th Cir. 1976); *United States v. Tucker,* 526 F.2d 654 (5th Cir. 1976); *United States v. Hunt,* 505 F.2d 931 (5th Cir. 1974).

The basic principle as stated by the Supreme Court in *Alderman v. United States,* 394 U.S. 165, 171-72, 89 S. Ct. 961, 22 L.Ed.2d 176 (1969) is that the suppression of evidence based on the Fourth Amendment violation "can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Co-conspirators and co-defendants have been accorded no special standing."

The defendant who seeks to suppress the evidence must establish that he was a victim of an invasion of his own privacy. *Jones v. United States,* 362 U.S. 257, 261, 80 S.Ct. 725, 731, 4 L.Ed.2d 967 (1970).

Defendant Mann testified at length in support of his motion to suppress, and in support of his theory that he was within the contiguous zone of the Mexican waters. The United States, in recognition of the doctrine in *Simmons v. United States,* 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) did not attempt to introduce Mann's admissions during the suppression hearing at trial.

Defendants here were charged with a conspiracy to possess marijuana with intent to distribute within the United States, and a conspiracy to import marijuana into the United States. Possession of the seized item at the time of seizure was not an element of either crime, and thus defendants had no "constructive standing." See the reasoning of the Fifth Circuit in *United States v. Archboll-Newball, supra.*

For the reasons stated herein, defendants' motion to suppress was in all things overruled.

DONE at Galveston, Texas, this the 29th day of December, 1978.

FINIS E. COWAN
United States District Judge